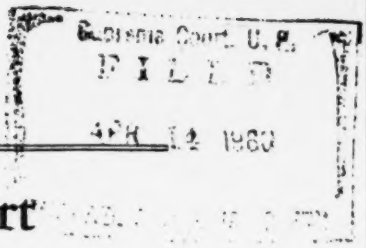

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1611

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

vs.

ROBERT MATA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	4
A. Proceedings in the state courts	4
B. Proceedings in federal court	5
C. Statement of the facts adduced at trial	6
1. The murder	6
2. The pretrial identification procedures	8
Reasons for granting the writ	10
Argument	13
I	
Respondent's default should bar consideration of his claim and at the least, the state court of appeal's findings should be accorded a presumption of correctness	13
A. Proceedings in the state courts	13
B. Proceedings in the federal courts	14
1. The United States district court	14
2. The court of appeals	15
C. Argument	16
II	
The availability of a suspect for a physical lineup does not render the use of a photographic lineup constitutionally suspect. Moreover, the standard which the court of appeals used to determine the likelihood of misidentification is erroneous	19
A. There is no requirement that necessity must be shown before a state may use a photographic array for pretrial identification purposes	22
B. The standard which the court of appeals uses to determine the likelihood of irreparable misidentification is erroneous and its factual findings without support in the record	28
Conclusion	32

TABLE OF AUTHORITIES CITED

Cases	Page
Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969)	12
Fay v. Noia, 372 U.S. 911 (1963)	18
Frank v. Blackburn, 605 F.2d 910 (5th Cir. 1979)	26
Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979)	26
LaVallee v. Delle Rose, 410 U.S. 690 (1973)	11
Manson v. Brathwaite, 432 U.S. 98 (1977)	17, 24, 25, 28
McNeary v. Stone, 482 F.2d 804 (9th Cir. 1973) cert. denied, 414 U.S. 1071	21
Neil v. Biggers, 409 U.S. 188 (1972)	12, 19, 23, 24, 28, 31
Parker v. Swenson, 332 F.Supp. 1225 (E.D. Mo. 1971)	28
People v. Lawrence, 4 Cal.3d 273, 481 P.2d 212, 93 Cal.Rptr. 204 (1971)	18
Simmons v. United States, 390 U.S. 377 (1968)	17, 19, 22, 23
Stovall v. Denno, 388 U.S. 293 (1967)	22, 23
United States v. Ash, 413 U.S. 300 (1973)	26
United States v. Baxter, 492 F.2d 150 (9th Cir. 1973) cert. denied, 414 U.S. 801 and 416 U.S. 940	21
United States v. Bennett, 445 F.2d 638 (9th Cir. 1971) cert. denied, 404 U.S. 1023	21
United States v. Boston, 508 F.2d 1171 (2nd Cir. 1974) cert. denied, 421 U.S. 1001	25
United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976) cert. denied, 429 U.S. 1064	21, 28
United States v. Crawford, 576 F.2d 794 (9th Cir. 1978)	21, 28
United States v. Evans, 484 F.2d 1178 (2nd Cir. 1973)	25, 27
United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976) rehearing denied, 530 F.2d 976, cert. denied, 429 U.S. 841	26
United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973)	25
United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977) cert. denied, 434 U.S. 1015	25

Table of Authorities Cited

Cases	Page
United States v. Valdivia, 492 F.2d 199 (9th Cir. 1973) cert. denied, 414 U.S. 801 and 416 U.S. 940	21, 28
United States ex rel. Pella v. Reid, 527 F.2d 380 (2nd Cir. 1979)	25
United States ex rel. Ross v. Fike, 534 F.2d 731 (7th Cir. 1976)	12
Wainwright v. Sykes, 433 U.S. 72 (1977)	11, 16, 18, 19
Warden v. Hayden, 387 U.S. 294 (1967)	12

Statutes

ALI Model Code of Pre-arraignment Procedure (1975) section 160.2	26
California Evidence Code, section 353	16
28 U.S.C.:	
section 1254(1)	2
section 2254	3, 5, 11
section 2254(b)	2
section 2254(d)	2, 11, 12, 14, 15, 19

Constitution

United States Constitution, Amendment XIV, section 1	4

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VS.

ROBERT MATA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 21, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 611 F.2d 754 and is attached to this petition as Appendix A. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* is unreported and is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 21, 1979. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on January 31, 1980. This petition is timely filed within 90 days of the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals contravene the requirements of 28 U.S.C. § 2254(b) and (d):

A. When a state prisoner failed to use an available state remedy—i.e., a procedure for contesting the admissibility of identification testimony offered by the prosecution at trial—but the state appellate court, nevertheless considered the issue on the merits, is the state foreclosed from asserting the doctrine of procedural default in a federal habeas proceeding?

B. Assuming that the state appellate court's action precludes the state from asserting the doctrine of procedural default in the federal habeas proceedings, may the state submit the findings of the state appellate court and assert the presumption of correctness which 28 U.S.C. § 2254(d) gives to factual findings by a state trial court?

C. If the presumption of correctness does not accompany the state appellate court's factual findings, is the state at least entitled to litigate the fairness of the identification process at a special hearing because it was previously denied a hearing by the defendant's tactical decision

at trial not to contest the admissibility of the identification testimony?

2. Did the Court of Appeals apply erroneous standards in evaluating respondent's claim of denial of due process in the use of pretrial identification procedures?

A. Does the availability of a suspect for a physical lineup render the use of photographic identification procedures constitutionally suspect?

B. Did the Court of Appeals apply the correct standard to determine the likelihood of irreparable misidentification?

C. Are the Court of Appeals' *de novo* factual findings supported by the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, United States Code section 2254 provides in pertinent part:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> * * *
>
> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent

jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,

* * *

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

United States Constitution, Amendment XIV, section 1 provides in part:

". . . No State shall deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On July 4, 1973, respondent was sentenced to life imprisonment following his conviction for first degree murder in the Superior Court of California, County of Kern.

On his direct appeal, the California Court of Appeal affirmed the judgment of conviction. A copy of the Court of Appeal's opinion is attached to this petition as Appen-

dix C. No petition for hearing by the California Supreme Court was sought.

In state habeas corpus proceedings, the Superior Court for the County of Marin denied respondent's petition raising the claim in a minute order on April 1, 1977; the Fifth District Court of Appeal summarily denied respondent's petition on August 2, 1977; and the California Supreme Court summarily denied respondent's petition on November 14, 1977.

B. Proceedings in Federal Court

On December 9, 1977, respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. On May 23, 1978, the district court filed a judgment and order denying the petition. A copy of the court's opinion is attached to this petition as Appendix D.

The Ninth Circuit filed its opinion on December 21, 1979 (Appendix A). A majority of the panel reversed the murder conviction and ordered the district court, upon remand, to "hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a new trial against [respondent]. . . ." 611 F.2d at 760 (A-12).

A petition for rehearing and suggestion for rehearing *en banc* was filed on January 4, 1980. On January 31, 1980, the Court denied the petition for rehearing, though Judge Sneed would have granted the same, and all three judges rejected the suggestion for *en banc* review (Appendix B).

Our request for recall and stay of the mandate was filed on February 26, 1980, and was denied on March 5, 1980.

C. Statement of the Facts Adduced at Trial

1. The Murder

The murder victim, Leonard Arias, had just arrived at the California Correctional Institution at Tehachapi on October 19, 1972, and was socializing with inmates Rigoberto Almengor and Jay Allen, when a call over the institution's loudspeaker ordered all new arrivals to report to the prison laundry room (RT 372, 584). The three men proceeded to the laundry room and passed respondent and his two co-defendants, Gallegos and Vargas (RT 79, 373, 375, 510, 587, 676, 677). Respondent and his co-defendants approached Arias and began hitting him. Gallegos stabbed Arias and one of the three pulled a knife out of Arias' back (RT 377-379, 587). Inmate Allen attempted to help Arias but one of the three assailants jabbed at him, ripping his jacket (RT 588). Almengor joined the fray, and fought with respondent Mata, who had a knife (RT 380). Allen caught Arias as he fell to the floor and Gallegos and Vargas fled through the dormitory door (RT 383-383, 589).

Robert Loomis, a correctional officer at the prison, heard the fight and when he entered the room, inmate Allen yelled, "a guy has been stuck, get an ambulance." (RT 236). Loomis opened his office door and dialed control for assistance (RT 237).

One and one-half minutes after hearing the fight in dorm 8, inmate Juan Olvera saw Gallegos coming from dorm 6 which was near dorm 8 (RT 512). Gallegos was in a hurry and told Olvera, "If they ask about me, tell them I've been

with you for the last hour" (RT 513). Gallegos had a pair of black leather gloves rolled up in his hand at the time (RT 514). One of the persons who stabbed Arias had gloves on (RT 622).

At approximately 2:00 p.m. on the afternoon of the killing, a search of the institution was conducted (RT 658). A knife was discovered in the trash can of dorm 5 and a jacket with blood on the sleeve was found under bunk number 56 of the dorm (RT 659, 660-661). Respondent Mata resided in bunk number 60 of that dorm (RT 658). Broken grass shears were found on the floor between the door of dorm 8 and the spot where Arias' body had fallen (RT 670). The handle portion of the shears was found on the stairs leading into the dorm (RT 672).

The day following the killing, Albert Mills, a correctional officer at Tehachapi, was contacted by inmate Paul Childress who indicated that he had witnessed the incident (RT 673-674). Childress named Mata and one of his co-defendants as the killers and identified the other co-defendant from a picture (RT 285-288, 676-677). Because Childress feared for his life he was placed in segregation confinement (RT 675, 678). While in segregation, he saw Mata, Vargas, and Gallegos, who had also been so confined (RT 289). Defendant Gallegos asked him if he was "ratting on the thing" but he answered that he wasn't (RT 291).

Carlos Ortega, the chief at Tehachapi of the Mexican Mafia prison gang, testified that Mata and Vargas, also members of the Mafia, contacted him before the killing. Mata told him that the victim was due to arrive at the prison, and that they were ordered "to hit" him (RT 822-

824). The next day, October 19, he, Mata and Gallegos met. Mata and Gallegos urged Ortega "to get down," meaning to arm himself with a knife and stab the intended victim (RT 824). When Mata and Gallegos departed, Vargas approached Ortega. Mata and Gallegos returned and Mata tried to give Ortega a knife. Mata said he had another knife in his belt (RT 830-831). Ortega refused to take the knife, and Vargas called him a "cry baby" (RT 832).

Ortega and Gallegos were among several inmates transferred to another institution after the incident. En route, Gallegos said, "My knife broke when I hit him. We all worked out on it." (RT 830-839).

Joe Escobar testified that he was a member of the Nuestra Familia, a rival group to which the victim Arias belonged (RT 1154). Just before the stabbing took place, Escobar saw respondent and his two co-defendants walking toward dorm 8, where the stabbing took place (RT 1175-1178). Escobar saw Gallegos a short time later; his face was flushed and he appeared excited (RT 1178). That evening Escobar saw Mata, who motioned to him and smiled, indicating that he had "hit" the victim (RT 1183-1184).

The defense was one of denial by all three defendants. Three witnesses testified that respondent was on his own bed playing cards near the time when the stabbing took place (RT 1016, 1106, 1131).

2. The Pretrial Identification Procedures

October 19, 1972

Both Almengor and Allen were questioned on the evening of the incident. Almengor named "Bogus" Pete Nunez as one of the assailants. This name had been provided to

him by other inmates, based upon his description of one of the assailants (RT 399). Almengor identified "Bogus" Pete, and tentatively identified defendant Vargas, and inmates Ramirez and Reymundo from a rollodex of all of the inmates on the "medium side" of the institution (RT 398-400, 711, 734, 914-915). Almengor testified that he selected eight photographs as bearing similarities to the three assailants (RT 401).

Allen was not shown any photographs that evening since he asserted that he could not make any identifications (RT 720).

October 27, 1972

Due to prison disturbances, Almengor and Allen were not contacted again for the purpose of making identifications until October 27, 1972 (RT 725, 927).

At this time, Allen was shown a group of photographs introduced into evidence as Exhibit 23,[1] which included the photographs of Mata, Gallegos, and Vargas. The names of the inmates were co. ealed (RT 720). Allen again made no identifications, and complained that the photographs were too old (RT 720-721).

Almengor was also shown the photographs introduced at trial as Exhibit 23 with the names of the inmates concealed (RT 715). Outside Allen's presence, Almengor again tentatively identified the photo of Vargas (RT 437, 711, 959).

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[1]At this time, we have certified the record to include Exhibits 23 and 24, the two photographic arrays preserved and introduced at trial.

Almengor said that he felt the photographs were too old and that appearances might have changed. He requested up-to-date photographs (RT 716).

Up-to-date photographs were taken of the three defendants and other inmates but none were useable. The three defendants were photographed a second time and these pictures are included among the fifteen photographs comprising Exhibit 24. All these photographs are black and white, are of the same size, have the same quality of "newness", and are of inmates of Mexican descent. The defense asserted that Allen and Almengor saw the defendants being taken out for photographing. Allen testified he was unaware that they were being photographed; Almengor testified that he knew Gallegos was being photographed but was unaware respondent and Vargas were with him (RT 444, 445, 625, 634).

October 30, 1972

On October 30, 1972, Allen and Almengor were shown the group of photographs introduced as Exhibit 24.

First Almengor was shown the photographs with the inmates' names concealed, and he identified all three defendants (RT 722). Then Allen was brought in and, while Almengor stood on the other side of the room, Allen likewise identified Mata, Gallegos, and Vargas as the assailants (RT 722).

REASONS FOR GRANTING THE WRIT

From the standpoint of raw power, a single federal district judge in a habeas corpus proceeding can nullify the product of a state's entire criminal justice system. In re-

sponse to abuses of that awesome power and in the interests of comity between federal and state courts, this Court and Congress over the past two decades created two doctrines which serve to limit unwarranted federal reversals of legitimate state court convictions. One is the rule which bars federal habeas review to a state prisoner who has failed to raise issues in the state courts in accordance with the requirements of state procedure absent a showing of "cause" and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). The other is the requirement that federal habeas courts defer to state court factual findings rendered after full and fair hearings. *LaVallee v. Delle Rose,* 410 U.S. 690 (1973); 28 U.S.C. § 2254(d).

The district court rejected outright our procedural default argument, and denied habeas relief in some cryptic and conclusory findings without confronting our section 2254 argument. On the other hand, the Ninth Circuit not only failed to acknowledge our 2254 argument but also ignored the conventional function of appellate review. In an opinion which can easily be mistaken for the jury argument by trial counsel, the Ninth Circuit not only set the murder conviction at large but precluded any use at retrial of the testimony of two eyewitnesses to the fatal stabbing.

This Court should grant certiorari to clarify two significant limitations on federal habeas corpus review which have become somewhat muddied. First, a state should not be precluded from asserting the doctrine of procedural default simply because a state appellate court, in disregard of settled appellate procedure, has considered and decided on appeal an issue which the defendant failed to preserve

by objecting at trial. Dictum by this Court in footnote three of *Warden v. Hayden*, 387 U.S. 294, 297 (1967), has led some circuit courts to an opposite conclusion. See, e.g., *United States ex rel. Ross v. Fike*, 534 F.2d 731 (7th Cir. 1976); *Curry v. Wilson*, 405 F.2d 110, 112 (9th Cir. 1969). But even if review on the merits by a state appellate court forgives the failure to use available state remedies, at the least the factual findings by the state appellate court on the issue should be afforded a presumption of correctness when offered in a federal habeas proceeding. See 28 U.S.C. § 2254(d). And at the very least, if the state may not assert the presumption of correctness, it should be afforded the opportunity to litigate the issue at a special hearing, a hearing previously denied it by the defendant's failure to object during his trial.

Moreover, the Ninth Circuit found that since it was not necessary to use pretrial photographic identification procedures—that is, a corporeal lineup was possible—the use of photographic identification procedures was therefore classified as unnecessarily suggestive inasmuch as it triggered the application of a test for determining whether there was a substantial likelihood of irreparable misidentification. The court then adopted a set of factors for determining the likelihood of misidentification from a 1971 district court case, which standard differs significantly from those set forth by this Court in *Neil v. Biggers*, 409 U.S. 188 (1972). Finally, the Court of Appeals' *de novo* factual findings are not supported by the record.

Certiorari should be granted so that this Court can resolve the conflicts among the circuits regarding whether the use of otherwise nonsuggestive photographic identifi-

cation procedures renders such procedures constitutionally suspect in the absence of necessity.

ARGUMENT

I

RESPONDENT'S DEFAULT SHOULD BAR CONSIDERATION OF HIS CLAIM AND AT THE LEAST, THE STATE COURT OF APPEAL'S FINDINGS SHOULD BE ACCORDED A PRESUMPTION OF CORRECTNESS

A. Proceedings in the State Courts

A jury convicted Robert Mata of first degree murder. Respondent did not litigate the admissibility of identification testimony at trial. Rather, trial counsel made a tactical decision to use the identification testimony of two of the eyewitnesses, Rigoberto Almengor and Jay Allen, to attack the credibility of the third eyewitness, Paul Childress, when they testified he was not there, knowing they could then attack Almengor's and Allen's credibility by painting the identifications as resulting from official suggestion.

The California Court of Appeal considered on the merits an argument relating to the admissibility of the identification testimony, notwithstanding respondent's failure to preserve the issue by objecting to the introduction of this evidence in the trial court. The court concluded that the circumstances of the case "indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." C-5. Specifically, the Court of Appeal found that the photographs displayed to the witnesses were available for cross-examination purposes at the trial, that there was no showing of influence by the

investigating officers, that the witnesses had an adequate opportunity to view the crime, and that the descriptions by the witnesses were accurate. (C-4, 5).

Respondent did not seek hearing before the California Supreme Court.

In habeas corpus proceedings, respondent again raised this issue, and for the first time complained that his counsel was incompetent for failing to object to the admission of this identification evidence at trial. The California Superior Court, Court of Appeal, and Supreme Court denied respondent's habeas corpus petitions without opinion.

B. Proceedings in the Federal Courts

1. The United States District Court

The district court failed to discuss or make any findings with respect to our section 2254(d) argument. The court also rejected our argument that respondent's claims were beyond federal review because of his procedural default. The district court proceeded to the merits of respondent's eyewitness identification claim and, based upon the same state court record, denied the petition after stating somewhat cryptically that "petitioner has established that irregularities occurred in the pretrial photographic identification of petitioner by witnesses Almengor and Allen." (D-3). The court concluded that these irregularities did not taint the in-court identifications by the witnesses and further concluded that even if the testimony of Allen was tainted, the positive identification by Childress and the strong identification by Almengor made the error harmless beyond a reasonable doubt. The court also found that re-

spondent's trial counsel was not incompetent for not litigating the identification issue at trial because the claim was "at best arguable, and that any error was harmless beyond a reasonable doubt." (D-3).

2. The Court of Appeals

The Ninth Circuit's opinion not only failed to acknowledge our section 2254(d) argument but also disregarded the limitations inherent in the appellate process. Rather than reviewing the district court's findings, the Ninth Circuit, after reviewing the trial court record, found itself "driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F.2d at 759 (A-11). The court went on to say "Due process of law cannot be predicated on a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect." *Id.* at 759 (A-11). Moreover, the court concluded that it "cannot hold that the error in allowing these identifications was harmless beyond a reasonable doubt." *Id.* at 759-760 (A-12). Reversing and remanding the case to the district court, the only option the Ninth Circuit offered was one of holding the case in abeyance for a period of 90 days "within which time California's prosecutors may, if they so choose, initiate a new trial against the appellant, a trial in which prosecutorial evidence barred by the federal Constitution will not be introduced." *Id.* at 760 (A-12). Thus, in the Ninth Circuit, respondent prevailed on an issue which his trial counsel, in

a tactical decision, elected not to present to the state trial court.

C. Argument

By virtue of respondent's tactical decision to withhold objection to the identification testimony at trial,[2] and the state Court of Appeal's gratuitous consideration and rejection of his claim on the merits, the federal court system has allowed respondent to slice through a procedural default barrier, and at the same time be shielded from a presumption of correctness of the state court's findings rejecting his claim.

The evils which this Court addressed in *Wainwright v. Sykes,* 433 U.S. 72 (1977) are realized in this case. Respondent has also been permitted to utilize a record where the People had no incentive or opportunity to demonstrate the admissibility of the evidence when the witnesses were available and their recollections fresh, and where the trial judge made no factual findings though he was the only judge who observed the demeanor of the witnesses. *Wainwright v. Sykes, supra* at 89.

To allow the federal courts to reach respondent's claim on the merits is to allow defense counsel to "sandbag" on their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in federal court if their initial gamble did not pay off. *Ibid.*

A finding of procedural default is particularly appropriate in the context of this case. This Court has observed

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[2]California's contemporaneous objection rule is codified in California Evidence Code section 353.

that the due process right involved here protects an evidentiary interest, which has a limited impact on our adversary system.

> " 'It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process.
>
> "Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.' " *Manson v. Brathwaite,* 432 U.S. 98, 113-114, n. 14 (1977) (citations omitted).

This Court's faith in the fact-finding ability of our juries is also evidenced by the observation in *Simmons* that "the danger that use of the technique may result in convictions based upon misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." *Simmons v. United States,* 390 U.S. 377, 384 (1968).

This Court reiterated this point in an often-cited passage from *Manson v. Brathwaite,* 432 U.S. 98, 116 (1977):

> "We are content to rely upon the good sense and judgment of American juries, for evidence with some extent of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they can-

> not measure intelligently the weight of identification testimony that has some questionable feature."

In the instant case, the photographs from which the witnesses made their identifications were preserved and introduced at trial. Counsel for respondent and both co-counsel cross-examined prosecution witnesses at length in an effort to reveal the possibility of prejudice and impugn their identification testimony and vigorously argued to the jury that these identifications were tainted. (*See People v. Lawrence*, 4 Cal.3d 273, 278-279, 481 P.2d 212, 93 CaR 204 (1971). Is there any doubt that respondent is being given two bites from the same apple—the right he exercised at trial to use the identification testimony to impeach the eye-witnesses testimony and attack the case against the People, and now the right to complain that despite his failure to object, admission of this testimony violated his due process rights in his federal habeas corpus claim?

Nor should the state Court of Appeal's decision be deemed waiver of this default. This Court's opinion in *Wainwright v. Sykes* explains the motivation for the State Court of Appeal's ruling, made prior to *Wainwright* while the rule of *Fay v. Noia*, 372 U.S. 911 (1963) prevailed:

> "Under the rule of *Fay v. Noia*, state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas corpus court will decide the question without the benefit of their views." *Id.* at 89.

Thus, the state court's ruling on the merits should not be considered a waiver of respondent's procedural default.

If it is determined that the state appellate court forgave the default by reaching the merits, surely its resolution of the facts is entitled to the presumption of correctness accorded state court findings by 2254(d). To rule otherwise would be to reward respondent's tactically motivated noncompliance with the contemporaneous objection rule. *Wainwright v. Sykes, supra* at 90.

The Ninth Circuit disregards the federal rules by not according the state's factual findings a presumption of correctness, yet making its own factual findings on the same "cold" state record. At the very least, if a "cold" record cannot serve as a basis for a presumption of correctness, the state should be given the opportunity to present evidence on this issue in an evidentiary hearing before *de novo* factual findings are made by any federal court.

II

THE AVAILABILITY OF A SUSPECT FOR A PHYSICAL LINEUP DOES NOT RENDER THE USE OF A PHOTOGRAPHIC LINEUP CONSTITUTIONALLY SUSPECT. MOREOVER, THE STANDARD WHICH THE COURT OF APPEALS USED TO DETERMINE THE LIKELIHOOD OF MISIDENTIFICATION IS ERRONEOUS

The Ninth Circuit's opinion purported to follow *Simmons v. United States,* 390 U.S. 377 (1968) and *Neil v. Biggers,* 409 U.S. 188 (1972), which hold that a conviction based on eyewitness identification at trial following a pre-

trial identification by photograph will be set aside as a denial of due process only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. See 611 F.2d at 757 (A-6, 7).

The opinion, however, describes and follows a "two-part approach" which the Ninth Circuit has independently developed in determining the admissibility of an in-court identification. The court identifies and applies the first part of this approach by stating:

> "First, the *necessity* of the photographic identification procedure is considered. In this case, appellant was an inmate at the Tehachapi facility and was placed in segration after the stabbing. It seems quite clear, therefore, that there was no necessity here to use photographic identification procedures. While lack of necessity is not a *per se* ground for rejection of the identification, we have consistently held that necessity is an important factor to be considered in judging the validity of the identification procedures." *Id.* at 757 (citations omitted) (A-7).
>
> "The second standard or tier of our court's traditional approach is 'whether there was a very substantial likelihood of irreparable misidentification'." *Id.* at 758 (A-7, 8).

Applying this test the court concludes that:

> "Based upon the lack of necessity, the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant by Almengor, and the inescapable focusing of attention upon the appellant by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so

> impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 759 (footnote omitted) (A-11).

We submit that the test articulated by the Ninth Circuit departs radically from the holdings of this Court. Despite the fact that this Court has stressed that reliability is the "linchpin" in determining the admissibility of identification evidence following pretrial identification confrontations, the Ninth Circuit's test introduces factors which have no possible bearing on the reliability of that evidence. Furthermore, the Ninth Circuit's test conflicts with the interpretation of this Court's holdings which have generally been reached by the other circuits and by the state courts. Since the Ninth Circuit's articulation of this test appears to be considered pronouncement, based on a line of previous Ninth Circuit cases, its opinion in this case cannot be classified as an aberrant decision which is unlikely to influence the results of other cases.[3]

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[3]The case appears to be part of a significant line of cases decided by the Ninth Circuit in which its "two-part approach" has been used to resolve questions regarding the admissibility of identification evidence following pretrial identification confrontations in a variety of factual contexts. *United States v. Calhoun*, 542 F.2d 1094, 1104 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064; *United States v. Valdivia*, 492 F.2d 199, 209-210 (9th Cir. 1973), *cert. denied*, 414 U.S. 801 and 416 U.S. 940; *United States v. Baxter*, 492 F.2d 150, 170-173 (9th Cir. 1973), *cert. denied*, 414 U.S. 801 and 416 U.S. 940; *McNeary v. Stone*, 482 F.2d 804 (9th Cir. 1973), *cert. denied*, 414 U.S. 1071; *United States v. Bennett*, 445 F.2d 638 (9th Cir. 1971), *cert. denied*, 404 U.S. 1023; *see also United States v. Crawford*, 576 F.2d 794, 797 (9th Cir. 1978).

A. There Is No Requirement That Necessity Must Be Shown Before a State May Use a Photographic Array for Pretrial Identification Purposes

This Court's cases do not require that "necessity" must be demonstrated before photo identification procedures may be used. It is true that in *Stovall v. Denno,* 388 U.S. 293 (1967), a case involving a show-up of a single handcuffed suspect (a practice which the Court noted had been "widely condemned"), the Court stated that a claimed violation of due process in the conduct of a confrontation depends on the totality of circumstances surrounding it and, in finding that there had not been a violation of due process, stressed that under the circumstances there was no practical alternative to a single-person show-up. *Id.* at 302. *Stovall* does not hold that lack of "necessity" for use of a particular identification procedure (especially one that may not, in itself, be impermissibly suggestive) weighed in favor of a finding that the suspect's due process rights had been violated.

In *Simmons v. United States, supra,* 390 U.S. 377, the first case in this Court dealing with photo identifications, the Court noted that, "this procedure has been used widely and effectively in criminal law enforcement." *Id.* at 384. It then held that: ". . . [C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* In applying this test to the case before it, the Court noted that it had not been suggested that it was "unnecessary" to use photo

identification procedures. Use of such procedures was justified by the fact that the suspects were still at large when their pictures were shown to the witnesses and it was essential for the FBI swiftly to determine whether they were on the right track. *Id.* at 384-385. The Court then noted that in the circumstances of this case there was "little chance that the procedure utilized led to misidentification of *Simmons*." *Id.* at 385. This case does *not* hold that lack of "necessity" for use of photographic identification procedures weighs in favor of a finding that the suspect's due process rights have been violated.

The meaning of *Stovall* and *Simmons* became clearer in the Court's subsequent cases. In *Neil v. Biggers, supra,* 409 U.S. 188, a case involving an identification at a single-person show-up, the Court reviewed its previous cases and stated the principle to be extracted from them: "It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.* at 198. The Court then stated: "What is less clear from our cases is whether . . . unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent [in order to construct a lineup], we do not think that the evidence must therefore be excluded." *Id.* at 198-199 (footnote omitted).

The Court then turned to the "central question" of "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199. It stated that: ". . . [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

Applying these factors to the case before it, the Court found that the identification was reliable and that the district court, which reached the opposite conclusion, "focused unduly on the relative reliability of a lineup as opposed to a show-up." *Id.* at 200.

In *Manson v. Brathwaite, supra,* 432 U.S. 98, a case involving identification by means of a single photograph shown to a witness, the court stated that the admission of evidence concerning a suggestive and unnecessary pretrial identification procedure does not violate due process as long as the identification possesses sufficient aspects of reliability. The Court applied a two-part approach in determining whether the suspect's due process rights were violated. The initial inquiry was whether the out-of-court identification was obtained by use of an impermissibly suggestive procedure. If it was, the Court then asked whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentifi-

cation. *Id.* at 107. If it did not, evidence of the out-of-court identification could still be admitted. The Court stressed that: ". . . [R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. . . . Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 114.

It is *Manson* which most dramatically underscores the error in the Ninth Circuit's approach. The Ninth Circuit equates lack of "necessity" for the use of photographic identification procedures with impermissible suggestiveness and requires a court to proceed directly from a finding of lack of "necessity" to application of criteria for determining whether identification possessed sufficient aspects of reliability. The lack of "necessity" is given weight among these factors as tending to detract from the reliability of the identification. 611 F.2d at 757, 759 (A-6, 7, 11).

The Ninth Circuit's approach is contrary to numerous cases decided by the other circuits. For example, in *United States v. Marchand,* 564 F.2d 983, 995 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1015, the court stated: "While it is preferable for law enforcement officers to use a line-up rather than photographic identification when the suspect is available, this is not a requirement." To the same effect are *United States ex rel. Pella v. Reid,* 527 F.2d 380 (2nd Cir. 1979); *United States v. Boston,* 508 F.2d 1171, 1176-1177 (2nd Cir. 1974), *cert. denied,* 421 U.S. 1001; and *United States v. Hurt,* 476 F.2d 1164 (D.C. Cir. 1973). In *United States v. Evans,* 484 F.2d 1178, 1186 fn. 8 (2nd Cir. 1973), the court specifically rejected a contention that

"taint" is established prima facie when the government has failed to use a "more reliable source of identification" when it is able to do so.

In *United States v. Gidley*, 527 F.2d 1345 (5th Cir. 1976), rehearing denied 530 F.2d 976, *cert. denied*, 429 U.S. 841, a case in which witnesses were showed a photo spread approximately two weeks before trial, the court states that: "In determining whether the photographic display was impermissibly suggestive, we evaluate only the picture spread itself—whether other more desirable methods of identification were available or whether there was a compelling need for a photographic display are not relevant in the determination." *Id.* at 1350.

Gidley has been consistently followed in the Fifth Circuit. The most recent cases following it are *Frank v. Blackburn*, 605 F.2d 910 (5th Cir. 1979) (rehearing *en banc* granted) and *Hudson v. Blackburn*, 601 F.2d 785 (5th Cir. 1979).

The Ninth Circuit's approach is also contrary to the great weight of the state court cases. The ALI Model Code of Pre-arraignment Procedure (1975) does not prohibit or restrict the use of photo identification procedures to situations where photo identification (as opposed to a corporeal lineup) is "necessary." The comments to section 160.2 of the Model Code (dealing with the conduct of identification procedures) note that, "most courts recognize no ban on photo identification when the defendant is in custody and a lineup is feasible." *Id.* at 440.

This position is in accord with this Court's general statement in *United States v. Ash*, 413 U.S. 300, 321 (1973):

"We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required."

The Ninth Circuit's standard conflicts with the standard adopted by this Court, by the other circuits, and by most of the states which have considered the issue. Despite the fact that this Court has repeatedly stressed that reliability is the keynote in determining the admissibility of identification evidence, the Ninth Circuit's standard identifies as an "important factor" a circumstance (the "necessity" for the use of photo identification procedures as opposed to corporeal lineup procedures) which has nothing to do with either suggestiveness or reliability. No due process interest of the defendant and no interest of society are protected by the Ninth Circuit's unique rule.

The issue presented by this case is not whether corporeal lineups should generally be used in place of photographic identification procedures when it is feasible to do so. Rather, the issue is whether the due process clause, as applied to the states, requires that corporeal lineups be used by equating failure to use them in the first instance with a finding that the other procedures actually used were impermissibly suggestive, and by giving this "finding" significant weight as detracting from the reliability (and hence admissibility) of identification evidence. As the court stated in *United States v. Evans, supra,* 484 F.2d at 1184, ". . . [T]o sustain the exclusion of identification testimony, there had to be a showing both of impermissibly suggestive procedures *and* of the substantial likelihood of misidentification. Where one or both are lacking, this Court concluded that eyewitness identification testimony was to be admitted."

B. The Standard Which the Court of Appeals Uses to Determine the Likelihood of Irreparable Misidentification Is Erroneous and Its Factual Findings Without Support in the Record

Having determined that lack of necessity results in a constitutionally suspect identification procedure, the Court of Appeals turned to a determination of whether there was a very substantial likelihood of misidentification. The Court adopts its criteria for making this determination from *Parker v. Swenson*, 332 F.Supp. 1225, 1230-1231 (E.D. Mo. 1971), a pre-*Biggers*, pre-*Manson* district court decision:

> "'(1) the length of time and the conditions under which a witness was able to observe the perpetrator during the commission of the crime . . . , (2) the similarity of the description given by a witness immediately after the crime to the physical characteristics of the individual he subsequently identifies, (3) conduct on the part of the police tending to focus attention on a particular subject, and (4) presence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection. *See Parker v. Swenson*, 332 F.Supp. 1225, 1230-1231 (E.D. Mo. 1971)." 611 F.2d at 758 (A-8).[4]

Compare and contrast this set of factors with this Court's test set forth in *Neil v. Biggers, supra*, 409 U.S. at 199-200, and used in *Manson v. Brathwaite, supra*, 432 U.S. at 114-115.

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[4]This standard, an apparent favorite of the Ninth Circuit, has also been used by the Court in *United States v. Valdiva, supra*, at 210; *United States v. Calhoun, supra* at 1104; and *United States v. Crawford, supra* at 797.

"1. The opportunity to view.

2. The degree of attention.

3. The accuracy of the description.

4. The witness' level of certainty.

5. The time between the crime and the confrontation."

The Court of Appeals' test is fatally defective in that under its factors (3) and (4) are included the very elements of suggestiveness which are supposed to be placed to one side in order to evaluate the independent basis for the identification. It also fails to consider two of the five factors set forth by this Court: the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

The Court's errors in establishing the standards to evaluate respondent's constitutional claim are compounded by its application of its own *de novo* factual findings which are not supported by the record. We will highlight some of the more critical factual determinations.

The necessity determination was resolved in two sentences:

> "In this case, appellant was an inmate at the Tehachapi facility and was placed in segregation after the stabbing. It seems quite clear, therefore, that there was no necessity here to use photographic identification procedures." 611 F.2d at 757 (A-7).

It does not follow that because prison officials had respondent segregated that a corporeal lineup was feasible. The difficulty was clearly not obtaining custody of him;

rather, it concerned arranging large groups of inmates, including the suspects, for identification by the witnesses.

Respondent's candid concession for the necessity of the photographic display at oral argument before the Ninth Circuit was based on the fact that this contract killing by the Mexican Mafia against a Nuestra Familia member prompted riots and the necessity to lock down the prison.

The majority's simplistic approach would mandate prison officials to line up large numbers of inmates of Mexican descent, some of whom no doubt would have connections with these prison gangs, with the expectation that in this face-to-face confrontation the witnesses would make an identification.[5]

Judge Sneed's dissent aptly acknowledges that "The prison world is unique. It differs enormously even from the precinct stationhouse and police headquarters. A 'code of silence' strengthened by taboos against 'ratting' and a pervasive fear of retaliation are characteristics of the social order. In this environment, prison administrators and guards must function. Administrators are responsible for protecting prisoners in their custody and may be held liable for a failure to provide such protection." 611 F.2d at 760 (citations omitted) (A-14).

In evaluating the likelihood of irreparable misidentification, the Court acknowledges, as it must, that the witnesses observed the stabbing and actually fought with respondent and one of his co-defendants. To repudiate

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[5]The Ninth Circuit opinion presupposes the existence of facilities at Tehachapi enabling a witness to view a lineup without having those in the lineup view the witness; in fact, no such facilities exist there.

this fact, the Court found "the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention." 611 F.2d at 758 (A-9). No empirical evidence demonstrating why this is "quite likely" is offered. Moreover, the conclusion is clearly erroneous in light of the testimony of Almengor that he and Mata made eye contact (RT 379-383). Thus, as in *Neil v. Biggers, supra* at 200, these witnesses were not "'casual observers" but were victims, as well, of the assault.

The only other appropriate factor considered by the Court, the accuracy of the description, also contains factual misrepresentations.

The majority acknowledged that Almengor told the investigating authorities that "two of the assailants were dark-complexioned and wore moustaches, while the other assailant looked like 'an Indian dude'. The appellant is of Mexican descent and wore a moustache at the time of the homicide." 611 F.2d at 758 (A-9). The Court concluded that this was "clearly not detailed" and compared the description in *Neil v. Biggers,* which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, and which this Court described as "more than ordinarily thorough." *Ibid.* Yet, the record contains more detail including a description of the types of moustaches ("a small moustache, more or less like mine" and "the one who was doing the stabbing, he had a thicker moustache"), and that this assailant had "sort of longer hair like coming up to his neck collar and twisting up." (RT 970). The clothing worn by the three was also described: they wore state issue jackets, gloves, and beanie

caps (RT 969-970). Their identification as being of Mexican descent is implicit in Almengor's request on October 19 to be shown pictures of "all the Mexican population on that side [the medium side] of the fence." (RT 397). Finally, inmate Allen testified that he knew Mata prior to this incident since at one time, they both lived in the same dorm. (RT 595).

To conclude, not only did the Ninth Circuit use an erroneous legal standard but its *de novo* factual findings are not supported by record.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: April 3, 1980

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(Appendices follow)

Appendices

Appendix A

No. 78-2636.

United States Court of Appeals,
Ninth Circuit.

Robert MATA,
Petitioner-Appellant,

vs.

George SUMNER,
Respondent-Appellee.

Dec. 21, 1979.

Rehearing Denied Jan. 31, 1980.

Before: ELY and SNEED, Circuit Judges,
and TAKASUGI,* District Judge.

ELY, Circuit Judge:

Robert Mata ("appellant") appeals from the District Court's denial of his Petition for Writ of Habeas Corpus. The Petition followed the appellant's conviction of murder in a California state court and his exhaustion of all available state court remedies.

We reverse the District Court's Order upon the basis of our conclusion that state authorities violated rights given to the appellant by the federal Constitution. First, the pre-trial photographic identification procedure em-

*The Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

ployed by state police was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable in-court misidentification of the appellant. Second, the admission of the in-court identification constituted error of constitutional dimension.

FACTS

This case involved a homicide at the medium security prison, C.C.I., Tehachapi, California, on October 19, 1972. The prosecution's case was based chiefly on the theory that the homicide was a result of feuding between opposing prison factions—the "Mexican Mafia" and the "Nuestra Family." The homicide victim, Leonard Arias, was represented to have been a member of the "Nuestra Family." Prior to being transferred to Tehachapi, Arias had allegedly attacked a member of the "Mexican Mafia" while at another California prison, San Quentin. As a result of this attack, the "Mexican Mafia" had a "contract" out on the life of Arias. The day after his arrival at Tehachapi, Arias was fatally stabbed.

The prosecution alleged that the appellant and co-defendants Gallegos and Vargas approached Arias and began hitting him. Gallegos stabbed Arias, and one of the three defendants pulled the knife out of Arias' back. One witness, Allen attempted to help Arias, but one of the three defendants jabbed at him, ripping his jacket. Another witness, Almengor, allegedly fought with the appellant, who had a knife.

The facts surrounding the pre-trial photographic identification procedures are set forth below:

October 19, 1972

Almengor was shown several hundred photographs of inmates. He selected eight photographs, making a positive identification of Pete Nunez as the person who did the stabbing, and tentatively identifying inmates Ramirez, Reymundo, and Vargas. He did not identify the appellant as a participant. Almengor changed his "positive" identification of Nunez when prison authorities told him that Nunez had been outside the prison on the day of the killing.

Allen was not shown any photographs on October 19th, since he asserted that he could not make any identification.

October 27, 1972

Almengor and Allen were shown twenty-four photographs of inmates, including photographs of the three defendants. Outside of Allen's presence, Almengor again tentatively identified the photograph of Vargas. Once again, however, Almengor did not identify the appellant. Moreover, Almengor stated that the photographs were too old and requested more recent ones. Allen was unable to make any identification, and he also complained that the photographs were too old.

October 27-October 30, 1972

A series of updated photographs were taken of the defendants and other inmates, but none of the photographs were useable. The photographs of the three defendants were the only ones taken a second time. The defense asserted that when the defendants were taken to be photographed, they were led out of the segregation unit in partial view of Almengor and Allen. It is disputed whether

Almengor or Allen actually recognized the defendants as the persons who were to be photographed.

October 30, 1972

Almengor and Allen were shown fifteen photographs of inmates. The only updated photographs included were those of the three defendants. Not included in the group of fifteen were the photographs of Ramirez, Reymundo, and Nunez. As indicated, Almengor had previously identified these men as suspects when he had been shown photographs on October 19th. The prosecution's position was that the exclusion occurred because the correctional officers did not consider these inmates as suspects.

In an interview on October 27, 1972, Almengor had described two of the assailants as having mustaches. Six of the fifteen photographs were of inmates wearing mustaches and prison dress. Three of the six photographs were the updated photographs of the three defendants, while the other three photographs were less than a year old. Although taken at different times, most of the photographs in the line-up were similar in terms of size, color, and pose. All of the inmates pictured were of Mexican descent. From these fifteen photographs, Almengor selected those of the three defendants. As indicated above, Almengor had never, prior to this time, identified the appellant. Allen was then brought in, and while Almengor stood on the other side of the room, Allen likewise identified the three defendants. This was the first time that Allen had made an identification of any of the assailants.

The appellant asserted that Almengor was informed by prison officials that he was a suspect because of the dis-

covery, shortly after the murder, of bloodied clothes that belonged to him. Further, it is not disputed that Almengor had asserted throughout much of the identification process that he could not make a positive identification from photographs. The prosecution conceded that Almengor requested a line-up and that this request was refused. No reason for the refusal was given.

In respect to Allen, appellant pointed to the fact that Allen originally stated that he could make no identification. Appellant also asserted that the California Department of Corrections "reminded" Allen of his upcoming parole date and threatened to transfer him, if he failed to cooperate, to another institution, a facility wherein his life would be in danger. Finally, appellant asserted that Allen told one Faulkner, a private investigator for the appellant, that (1) the incident lasted only a few seconds, and Allen did not get a good enough look at any of the assailants to identify them; (2) throughout the investigation Allen had maintained that he could not identify the assailants, and that he would take a lie detector test to substantiate this; (3) Allen assumed the three defendants must have been the ones who committed the murder because he saw them being taken to be photographed the second time; (4) Allen was due for parole and was under pressure from the Department of Corrections to make an identification.

The prosecution contended that the appearance of the appellant in the updated photograph was significantly different than the original photograph which had been taken three to eight months earlier. Furthermore, the prosecution relied upon Allen's testimony that he had feigned an

inability to make an identification because he was attempting to avoid involvement. In addition, the prosecution contended that Allen denied that correctional officers attempted to influence him and repudiated much of what Private Investigator Faulkner had testified that Allen had told him earlier. Finally, the prosecution pointed to evidence that Allen and Almengor did not ascertain the identity of who was being photographed a second time and thus did not "correctly select" the defendants on this basis.

DISCUSSION

I.

The presence of counsel is not constitutionally required during a pre-trial photographic display for purposes of suspect identification. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Such identification, however, may be challenged as violative of due process when the procedure is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293, 301-02, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) The validity of a photographic identification is to be evaluated in light of the particular facts and surrounding circumstances of each case. *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *United States v. Calhoun*, 542 F.2d 1094, 1104 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977). A conviction "based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . [as a denial of due process] only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substan-

tial likelihood of irreparable misidentification." *Simmons v. United States, supra*, 390 U.S. at 384, 88 S.Ct. at 971.

Our Circuit has generally followed a two-part approach in determining the admissibility of an in-court identification. *See, e.g., United States v. Valdivia*, 492 F.2d 199, 210 (9th Cir. 1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974); *United States v. Crawford*, 576 F.2d 794, 797 (9th Cir.), *cert. denied*, 439 U.S. 851, 99 S.Ct. 157, 58 L.Ed.2d 155 (1978). First, the *necessity* of the photographic identification procedure is considered. *Id.* In this case, appellant was an inmate at the Tehachapi facility and was placed in segregation after the stabbing. It seems quite clear, therefore, that there was no necessity here to use photographic identification procedures. While lack of necessity is not a *per se* ground for rejection of the identification, *see United States v. Calhoun, supra*, 542 F.2d at 1104; *United States v. Valdivia, supra*, 492 F.2d. at 210, we have consistently held that necessity is an important factor to be considered in judging the validity of the identification procedures. *See United States v. Peele*, 574 F.2d 489, 490 (9th Cir. 1978); *United States v. Calhoun, supra*, 542 F.2d at 1104; *United States v. Pheaster*, 544 F.2d 353, 370 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977); *United States v. Valdivia, supra*, 492 F.2d at 210; *United States v. Baxter*, 492 F.2d 150, 171 (9th Cir. 1973), *cert. denied*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1974).

The second standard or tier of our court's traditional approach is "whether there was a very substantial likelihood of irreparable misidentification." *United States v.*

Valdivia, supra, 492 F.2d at 210. Unnecessary suggestibility alone does not require exclusion of the subsequent indentification. *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "It is the likelihood of misidentification which violates a defendant's right to due process . . .." *Neil v. Biggers,* 409 U.S. 188, 198, 93 S.Ct. 375, 381-382, 34 L.Ed.2d 401 (1972). In other terms, "the focus is on the reliability of the witnesses' identification rather than on the flaws in the pretrial identification procedures." *United States v. Barron,* 575 F.2d 752, 754 (9th Cir. 1978). Several factors have been listed as relevant in the evaluation of the likelihood of misidentification:

> (1) the length of time and the conditions under which a witness was able to observe the perpetrator during the commission of the crime . . ., (2) the similarity of the description given by a witness immediately after the crime to the physical characteristics of the individual he subsequently identifies, (3) conduct on the part of the police tending to focus attention on a particular subject, and (4) presence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection. See *Parker v. Swenson,* 332 F.Supp. 1225, 1230-1231 (E.D.Mo.1971).

United States v. Valdivia, supra, 492 F.2d at 210. *See also United States v. Calhoun, supra,* 542 F.2d at 1104; *United States v. Crawford, supra,* 576 F.2d at 797.

In applying the facts of this case to well established standards, it is obvious that there was a grave likelihood of irreparable misidentification.

According to their testimony, witnesses Almengor and Allen observed the stabbing and actually fought with appellant and one of the co-defendants. This would have at least provided an opportunity for the witnesses to observe the perpetrators of the crime. On the other hand, the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention.

On October 27, 1972, Almengor told investigating authorities that two of the assailants were dark complexioned and wore moustaches, while the other assailant looked like "an Indian dude." The appellant is of Mexican descent and wore a moustache at the time of the homicide.

Yet, the descriptions of the assailants were clearly not detailed descriptions. *Cf. Neil v. Biggers, supra,* 409 U.S. at 200, 93 S.Ct. 375 (description included assailant's approximate age, height, weight, complexion, skin texture, build, and voice).

As for conduct on the part of the authorities "tending to focus attention on a particular subject," it should first be noted that there was not one, but three different sessions wherein Almengor and Allen were shown photographs. As stated in *United States v. Higginbotham,* 539 F.2d 17, 23 (9th Cir. 1976), wherein the witness was given a photographic display twice:

> While the repeated showing to a witness of photographic displays for the purpose of identification presents opportunities for abuse and due process problems, when it is shown that the witness was equivocal on the first selection and became firm on a later

showing, that rule should not be applied where the witness has been consistently firm.

See also United States v. Cook, 608 F.2d 1175 at 1178-79 (9th Cir. June 29, 1979) ("As with all photographic identification procedures, there is a possibility that the prior photo array tainted this later identification.").

Here, Almengor was not merely "equivocal" on the first selection. He selected photos of three individuals whom the prosecution asserts were not involved at all. Allen would not even look at the photos because he said he could not make an identification. The two witnesses made the "correct" selections on the third time around, and only after (1) Almengor's request for a line-up had been refused.[1] (2) considerable pressure from both the prison officers and opposing prison factions had admittely been brought to bear on both witnesses, (3) prior "mistaken" selections had been removed, (4) the number of photos had been drastically reduced; and (5) new photos of appellant and co-defendants (and only of these three) had been substituted in the array.[2]

The prosecution argued that the changed appearance of the appellant in the updated photograph accounted for the

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[1]As indicated above, the state authorities offered no reason why Almengor's request for a line-up was denied. Particularly in light of the witnesses' own complaints about the photographic identification procedure, we can only infer that the refusal stemmed from the reluctance of the prison officials to provide appellant with the assistance of counsel which would be required in a line-up procedure.

[2]*Cf. Simmons v. United States, supra,* 390 U.S. at 383, 88 S.Ct. at 971 (The danger of an erroneous identification by a witness "will be increased if the police . . . show [the witness] the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.").

sudden ability of Almengor and Allen positively to identify the appellant on October 30th. While we have looked at the photographic exhibits and do agree that there is some change in appearance, this fact must be balanced against the totality of circumstances. Based upon the lack of necessity, the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant by Almengor, and the inescapable focusing of attention upon the appellant by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Due process of law cannot be predicated on a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect.[3]

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[3]Having carefully considered the dissenting opinion, the majority deems it unnecessary to comment on that opinion, except for one portion thereof. The portion reads:

> "Pressure was indispensable in the circumstances of this case if the crime was to be solved reasonably quickly. I repeat, prison officials must operate in a humane manner but also in a fashion that takes into account the realities of prison environment. The officials in this case, in my opinion, merely did what we as citizens demand of them, *i. e.*, protect the inmates by apprehending those who recently had preyed upon one of them."

The record before us indicates, with unmistakable clarity, that the photographic identification procedures in question were *not* employed to "protect the inmates by apprehending those who recently had preyed upon one of them." In fact, the appellant had already been quickly apprehended and placed in segregation after the stabbing had occurred. Therefore, the impermissible procedures were utilized so as to assemble incriminating evidence against the appellant in order that the crime be more quickly "solved."

In the consideration of such a fundamental right as due process, there are, of course, much more treasured values than mere speed and efficiency. *See Wolff v. McDonnell*, 418 U.S. 539, 583, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (Marshall, J., dissenting); *Fuentes v.*

II.

From our review of the record, including the evidence introduced against the appellant, it is clear to us that the in-court identifications by Almengor and Allen constituted evidence that was of exceptional importance to the prosecution in its achievement of the appellant's conviction. Therefore, we cannot hold that the error in allowing these identifications was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *United States v. Lopez,* 575 F.2d 681, 685 (9th Cir. 1978). *See also Wilson v. Anderson,* 379 F.2d 330, 335-37 (9th Cir. 1967) (Ely, J., dissenting), *rev'd per curiam, Anderson v. Nelson,* 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968). Accordingly, the challenged Order of the District Court is reversed. Upon remand, the District Court will hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a new trial against the appellant, a trial in which prosecutorial evidence barred by the federal Constitution will not be introduced.

REVERSED and REMANDED, with directions.

Shevin, 407 U.S. 67, 90-91 n. 22, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1977). We cannot remain oblivious to the danger, a danger of the severest gravity, that investigating officials, in an effort quickly to solve a crime, may exert such coercive tactics as to lead to the mistaken identification of an innocent individual. Moreover, in the context of prison environment, the guarantee of due process rights is no less important than is that guarantee to society at large. All law abiding citizens share the desire that all crimes be solved with reasonable speed, but speed, in and of itself, cannot justify the infringement of basic constitutional rights. And, it is well established, of course, that a prisoner does not shed his basic constitutional protections when he enters an American prison. *See Finney v. Arkansas Board of Corrections,* 505 F.2d 194, 211 (8th Cir. 1974) and cases cited therein.

SNEED, Circuit Judge (dissenting):

I respectfully dissent.

The majority concludes that there was "a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect"; that there was no necessity to use photographic identification procedures; and that the procedures employed here created a grave likelihood of irreparable misidentification. Fortified by my examination of the photographs employed on October 27, 1972 and October 30, 1972 and the fact that, leaving aside the direct appeal process, three courts of the State of California (Superior Court of Marin County, Court of Appeal, Fifth Appellate District, and Supreme Court of California) and one federal court (District Court, Northern District of California) have failed to discern the "systematic plan" and to reach the conclusions so easily arrived at by the majority, I conclude that the procedures employed did not contravene the *Simmons* test as interpreted by this circuit.

In addition, I suggest that the application of the *Simmons* test in habeas corpus proceedings should be somewhat less rigorous than is the case in direct appeals from federal convictions. That is, the likelihood of irreparable misidentification should be sufficiently clear and convincing in habeas proceedings to require a setting aside of the conviction to prevent manifest injustice. This position involves recognition that a vigorous application of *Simmons* in the direct appeal setting rests, in part, on our supervisory powers rather than exclusively on the command of the Due Process Clause of the Fifth Amendment.

I. THE SIMMONS TEST AS USED ON DIRECT APPEAL

In applying *Simmons* as it would be on a direct appeal, the majority concludes much too easily that there was no necessity in this case to use photographic identification procedures. I disagree. The prison setting of the crime for which appellant was convicted and the investigation thereafter by prison officials in my opinion dictate the use of photographic identification procedures. Apparently the majority insists as a matter of constitutional law that there be employed lineups of a large group of inmates, with each suspect, or more likely a substantial group of inmates, which would include the suspects, suitably equipped with counsel, in lieu of photographic identification procedures. *See* p. 759 n. 1. To state the requirement reveals its impracticability. Moreover, it would impose heavy demands on the staff, strain employee relations, and expose the inmates to increased risks of bodily harm.

The prison world is unique. It differs enormously even from the precinct stationhouse and police headquarters. A "code of silence" strengthened by taboos against "ratting" and a pervasive fear of retaliation are characteristics of the prison social order. In this environment prison administers and guards must function. Administrators are responsible for protecting prisoners in their custody and may be held liable for a failure to provide such protection. *See, e.g., Sostre v. McGinnis,* 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972); Bennett, *Who Wants To Be Warden?,* 1 New England J.Prison L. 69, 69-70 (1974). Guards, directly responsible for prison order and security, jealously hus-

band their stock of authority and seek to avoid any confrontation that will deplete that stock. *See* National Institute of Law Enforcement and Criminal Justice, Prison Employee Unionism: The Impact on Correctional Administration and Programs 24-25 (1978). To require the type of lineup the majority envisions in this setting is to insist upon jeopardizing the security and safety of all as the price of securing the constitutional protection that the majority holds appellant is entitled. We should be reluctant to fashion constitutional doctrines whose price is so dear.

In any event, necessity, or the lack of it, constitutes but part of the *Simmons* test. *United States v. Crawford*, 576 F.2d 794, 797-8 (9th Cir.), *cert. denied*, 439 U.S. 851, 99 S.Ct. 157, 58 L.Ed.2d 155 (1978). The strength of the majority's position rests on the exertion of pressure by prison authorities on Almengor and Allen and the use of three photographic spreads in the manner described. Pressure was indispensable in the circumstances of this case if the crime was to be solved reasonably quickly. I repeat, prison officials must operate in a humane manner but also in a fashion that takes into account the realities of prison environment. The officials in this case, in my opinion, merely did what we as citizens demand of them, *i. e.*, protect the inmates by apprehending those who recently had preyed upon one of them.

The record of this case does not include the several hundred photographs shown to Almengor on October 19, 1972. The spreads of October 27 and 30, 1972, are included, however. So different is the appellant's photograph used in the October 27 spread from that of October 30 that it

is difficult to accept the fact that the appellant appeared in the October 27 spread at all. Nonetheless, I must accept that fact because both appellant and appellee agree that the appellant's photograph did appear in the October 27 spread. It remains true, however, that any failure to select the appellant's photograph in the October 27 spread may be attributable to the fact that it bore little resemblance to the appellant's appearance at the time of the murder of Arias.

The spreads of October 27 and 30, therefore, are not impermissibly suggestive on their face. Nor are they made so by the absence of the photographs of Ramirez, Reymundo, and Nunez. The range of choice available to Almengor and Allen remained large. Also, contrary to the majority's characterization is the weight that must be given to Almengor's description of the assailants of Arias and the consistency with which Vargas, one of the assailants, was identified. Admittedly the uncertainty surrounding Allen's motivations prior to his identification of the appellant compels us to review carefully the way in which the spreads were used. Allen's behavior, however, is consistent with an effort to avoid entanglement until his identification would yield the largest possible return to him. While such an attitude is not particularly noble, it is precisely the state of mind most prisoners would have under similar circumstances. In any event, I find it impossible to attribute his identification of appellant's photograph to an impermissibly suggestive use of photographic spreads. That Allen was subjected to official and unofficial pressures I do not doubt; but the *Simmons* rule should not be distorted to enable us to condemn on constitutional grounds

the inescapable use of such pressures in an investigation of a murder in a prison setting. Interpretations of our supervisorial powers or of the Constitution which ignore the realities of the environment within which they function bring discredit to both the courts and the Constitution.

II. COLLATERAL REVIEW AND SIMMONS

Should I be wrong about the application of *Simmons* to the facts of this case were it before us on direct appeal, I maintain that *Simmons* should be applied in habeas corpus proceedings so as to overturn convictions only in the case where clear and convincing evidence demonstrates that reversal is required to prevent manifest injustice. To so limit *Simmons* in habeas proceedings is in keeping with the scope the remedy historically has been given. *See Stone v. Powell*, 428 U.S. 465, 475, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich.L.Rev. 451 (1966). Although the scope of habeas relief has been expanded, it has remained a remedy for exceptional cases: "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay v. Noia*, 372 U.S. 391, 423, 83 S.Ct. 822, 840, 9 L.Ed.2d 837 (1963).

To apply *Simmons* in habeas proceedings to instances of manifest injustice requires recognition that "impermissible suggestiveness" for purposes of collateral review of state convictions rests on an interpretation of due process, assured by the Fifth and Fourteenth Amendments, that may not exhaust the full reach of *Simmons* which, it must be remembered, arose from a direct appeal from a federal conviction. Mr. Justice Harlan, speaking for the Court,

recognized that, in fashioning the *Simmons* standard, supervisorial powers, rather than constitutional commands, also could be the source of the Court's authority. 390 U.S. at 384, 88 S.Ct. 967. Limitation of *Simmons* in collateral review to "suggestiveness" so flagrant as to result in manifest injustice merely recognizes that the dictates of due process are somewhat less far reaching than are the supervisorial powers of federal courts over federal law enforcement officials. The existence of this difference appears to me to be neither unreasonable nor inconsistent with *Simmons*. It must be admitted that the distinction I suggest has not been utilized by the Supreme Court. *See Neil v. Biggers*, 409 U.S. 188, 196-09, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 121-22, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (J. Marshall dissenting); Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 Stan.L.Rev. 1097, 1106-09 (1974); *but see* Comment, *Photographic Identification: The Hidden Persuader*, 56 Iowa L.Rev. 408, 425-26 (1970). Nor has this circuit employed it. *See United States v. Allison*, 414 F.2d 407, 409 (9th Cir.), *cert. denied*, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969); *United States v. Baxter*, 492 F.2d 150, 170-71 (9th Cir.), *cert. dismissed*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974); *United States v. Jones*, 512 F.2d 347, 351 (9th Cir. 1975); *cf. United States v. King*, 433 F.2d 937, 938 (9th Cir. 1970), *cert. denied*, 402 U.S. 976, 91 S.Ct. 1681, 29 L.Ed.2d 142 (1971) (the court quoted Mr. Justice

Harlan's opinion that the Supreme Court has both supervisory and constitutional powers of review).

Also, *Stone v. Powell, supra*, while useful as an analogy, does not precisely justify my position because there the evidence admitted in the state proceedings in no way could be thought to have been "created" by improper official conduct. Its admissibility might be barred because of an improper search and seizure, but its genuineness and probity could not be questioned. Here the situation is different. In court identifications carry some taint whenever any nonfrivolous issue regarding the use of photographic spreads is raised. The taint, moreover, puts in issue the truth of the in court identification. It follows, therefore, that the balancing process employed by the Court in *Stone v. Powell*, in which the utility of the exclusionary rule is weighed against the costs of extending it to collateral review, is not applicable here. A different approach must be employed, one in which the constitutional standard employed in collateral review is somewhat less demanding than the supervisorial standard employed on direct appeal.

Notwithstanding the inapplicability of *Stone v. Powell*'s balancing process, it remains true that its emphasis upon the opportunity for full and fair litigation in the state courts is equally applicable here. 428 U.S. at 494, 96 S.Ct. 3037. This opportunity to litigate an issue as imprecise as "impermissible suggestiveness" in the state courts strongly suggests that collateral review by federal courts frequently is redundant. Repetitive collateral review employing a standard so amorphous more resembles a game of chance than it does the wise administration of criminal justice.

To so employ the Great Writ is to corrupt, not enhance it. *See Sneckloth v. Bustamonte*, 412 U.S. 218, 275, 93 S.Ct. 2041, 36 L.Ed.2d 854 (Powell, J., concurring). I would affirm the district court.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 78-2636

Robert Mata,
Petitioner/Appellant,
vs.
George Sumner,
Respondent/Appellee.

[Filed Jan. 31, 1980]

ORDER

Before: ELY and SNEED, Circuit Judges, and TAKASUGI,* District Judge

Of the judges constituting the panel originally concerned with the subject case (Ely, Sneed and Takasugi), Judges Ely and Takasugi have voted to deny the Petition for Rehearing. Judge Sneed would grant panel rehearing. Judge Sneed has voted to reject the suggestion for rehearing en banc, and Judges Ely and Takasugi have recommended that the suggestion be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

*Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

Appendix C

In the Court of Appeal
State of California

Fifth Appellate District

5 Crim. 1735
(Sup. Ct. No. 15771)

The People,
Plaintiff and Respondent,
vs.
Salvadore Vargas, David Gallegos, and Robert Mata
Defendants and Appellants.

[Filed Aug. 4, 1975]

OPINION

APPEAL from a judgment of the Superior Court of Kern County. P. R. Borton, Marvin E. Ferguson and John M. Nairn, Judges. Affirmed.

Douglas J. Morgan, under appointment by the Court of Appeal, for defendant and appellant David Gallegos.

C. Michael Farmer, under appointment by the Court of Appeal, for defendant and appellant Salvadore Vargas.

Jim D. Mills, under appointment by the Court of Appeal, for defendant and appellant Robert Mata.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Arnold O. Overoye, Joel

Carey and Anthony L. Dicce, Deputy Attorneys General for plaintiff and respondent.

Appellants herein, Salvadore Vargas, David Gallegos and Robert Mata, were tried jointly and were found guilty of murder in the first degree. All three were sentenced to state prison for the term prescribed by law. All three filed separate appeals, the contentions in which are treated here together.

FACTS

On October 19, 1972, inmate Leonard Arias was stabbed to death in a dormitory at the California Correctional Institution at Tehachapi. At approximately 1:30 p.m. of that day, Arias, one Rigoberto Almengor and one Jay Allen, all inmates of the institution, were drinking coffee and talking near Allen's bunk in Dormitory Eight. A call over the institution's loud speaker ordered all new arrivals to report to the laundry room. Arias had just arrived at the institution from San Quentin Prison the previous day and the three men thereupon proceeded to the laundry room.

On the way to the laundry room they passed three men who were standing by the bulletin board. These three men then turned and attacked the victim Arias. During the attack, Arias was stabbed with a knife several times, causing his death.

Each of the appellants denies partaking in the attack and subsequent killing; and each produced evidence tending to show that he was at another place in the prison at the time of the incident in question.

Multiple issues are raised by the respective appellants and assigned as prejudicial error requiring a reversal of the judgment.

I. *The Photographic Lineup Procedure.*

Both appellants Gallegos and Mata contend that there were prejudicial errors in the pretrial identification of them by certain prosecution witnesses.

Three inmate witnesses testified that they saw the stabbing take place. All three—Childress, Almengor, and Allen—identified all three defendants; but their testimony is attacked by appellants Gallegos and Mata on the basis of claimed improper pretrial photographic identification procedures. The witnesses were shown a number of photographs of Tehachapi inmates in an attempt to identify the slayers. Almengor was interviewed and shown photos on October 19, 1972, the day of the incident. He made a possible identification of appellant Vargas, but made possible misidentifications of the other two participants. On October 30, 1972, more recent photos were presented to Almengor and he identified all the appellants. On October 27, 1972, Allen was shown photographs but stated he could not make an identification because the photographs were old. On October 30, 1972, more photos were presented to Allen and he identified all three appellants. On that date Childress also selected all three appellants from photographs shown to him.

Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that

this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identifications by this action of the investigating officers.

It is established that the safeguards set forth in *United States v. Wade,* 388 U.S. 218 and *Gilbert v. California,* 388 U.S. 263 do not apply to pretrial photographic identification of a suspect. (*People v. Lawrence,* 4 Cal.3d 273.)

The *Lawrence* case followed the decision by the United States Supreme Court in *Simmons v. United States,* 390 U.S. 377, which reached a similar result. Both courts reasoned that particularly where the photographs from which the witness made his identification were preserved and available at trial, as was the situation in the case at bench, counsel for the accused can easily reveal the possibility of prejudice by using the photographs in cross-examination. (*Simmons v. United States, supra,* 390 U.S. at 384; *People v. Lawrence, supra,* 4 Cal.3d at 278-279.) Both courts have determined that each case must be considered on its own facts, and that *a violation of due process occurs and a conviction will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.* (See *Simmons v. United States, supra,* 390 U.S. at 384; *People v. Lawrence, supra,* 4 Cal. 3d at 280.)

Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscibed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no

showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence.

II. *Denial of Discovery.*

All three appellants contend tht the trial court abused its discretion in denying a motion for additional discovery.

At the commencement of the trial, counsel for the defendant Gallegos, Mr. Simrin, renewed a motion for discovery which had been made before another department of the court previously, and had been continued generally for hearing before the trial judge. This motion had been instituted by a notice in writing, coupled with the declaration of the attorney, and requested information from the Department of Corrections concerning (1) records and reports concerning the membership or non-membership of one Ortega, a prospective prosecution witness, in the Mexican Mafia; and (2) records and reports concerning the membership or non-membership of the three defendants; and (3) a list of all those persons alleged to have been members of the Mexican Mafia as of October 19, 1972. Counsel for the other defendants joined in the motion.

Subsequently, at an in-chambers conference prior to trial, the motion was limited to records concerning the witness Ortega; all counsel agreeing that if this witness were not called there would be no reason to urge the motion.

Thereafter, the desired files of the Department of Corrections were obtained, and an *in camera* hearing was held wherein the material was found to be of a privileged nature

and it was further found by the judge that the privilege outweighed any probative value the evidence may have to the defense. Although the judge did disclose certain information in the file to counsel for the defendants, he found that the balance of the file was privileged and in any event contained no further material of any probative value to the defendants. After the court had announced its decision, counsel for one of the defendants moved for further discovery on the file. The court denied the motion, and refused to permit counsel to state a reason for the further discovery for the record.

Absent some governmental requirement that information be kept confidential, the accused in a criminal trial is generally entitled to have access to all evidence in the hands of the prosecution or in possession of other agencies which are part of the criminal justice system and which can throw light on the issues in the case. (*People v. Riser,* 47 Cal.2d 566; *Engstrom v. Superior Court,* 20 Cal.App.3d 240.) It is therefore necessary to inquire whether the type of information sought to be discovered in the instant case is confidential, official information.[1]

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[1]We are not unmindful of the cases of *Procunier v. Superior Court* (Losoya), 35 Cal.App.3d 207, and *Procunier v. Superior Court* (Herth), 35 Cal.App.3d, 211, which hold that almost identical information was absolutely privileged under the provisions of Government Code section 6255.

These decisions, however, ignore section 6260 of the Government Code, which provides:

> "The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, *under the laws of discovery of this state.*" (Emphasis added.)

It thus appears that section 6255 of the Government Code is not applicable to these proceedings, and for this reason we do not feel bound by these decisions.

Section 1040 of the Evidence Code governs the disclosure of "official information". It provides, in part, as follows:

> "(a) As used in this section 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
>
> "(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
>
> "* * *
>
> "(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . ."

A provision for determination of a claim of privilege by the court is set forth in section 915 of the Evidence Code. This section provides as follows:

> "(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.
>
> "(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both,

> to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

Thus, provision is made for an *in camera* hearing before the judge alone, with only the objecting party present, when the claim of privilege is raised.

Evidence Code section 1042(a) provides for sanctions upon the public entity invoking the privilege were necessary. It states as follows:

> "(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material."

The Supreme Court has pointed out, in *Pitchess v. Superior Court* (Echeveria), 11 Cal.3d 531, 540, the results of the legislative enactment in the Evidence Code, as follows:

> "Evidence Code section 1040, therefore, represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy. Evidence Code section 1042, subdivi-

> sion (a), in turn, codifies the due process demand recognized by the United States Supreme Court that the prosecution cannot commence criminal proceedings 'and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.' [Citations omitted.] In concert, the two provisions create an orderly and fair procedure designed to safeguard the legitimate interests of both the government and criminal defendants."

It is thus clear that there should be an *in camera* hearing wherein the trial judge examines the requested evidence when the privilege is invoked.

There is, however, a conflict amongst the cases as to whether or not an adversary hearing is necessary after the *in camera* examination of the evidence. In *People v. Superior Court* (Biggs) 19 Cal.App.3d 522, in a well reasoned opinion the court held that the *in camera* hearing provided by section 915(b) is merely a preliminary inquiry to acquaint the judge with the nature of the government secrets and the public necessity of confidentiality; that thereafter, the other Evidence Code sections requiring a preliminary determination of the foundational facts come into play, and that an adversary hearing should be held outside the presence of the jury to determine the necessity of the defendant for the information and the judge should then balance such necessity against the public necessity of confidentiality. At such hearing, the court points out, consideration of alternative evidence offered by the state could be given, and the needs of the defendant might even be satisfied in whole or part without destroying the confidentiality of the files.

In *People v. Woolman*, 40 Cal.App.3d 652, the court took a contrary view, referring to the language of *Biggs, supra,* as dicta and indicating the court's opinion that such a procedure would destroy the privilege the hearing is designed to protect. The court held nothing more than an *in camera* examination of the evidence is required.

Clearly there was no error here if we follow the precepts of *Woolman.*

We also find that in *Biggs* the court states (page 532):

> "In weighing the defendant's need, the court was not to pass upon the veracity of his claim, but only to ascertain if a reasonable possibility existed that the requested information might exonerate him."

In the instant case, it is clear that the sole purpose of the requested information was in connection with the testimony of the witness, Ortega.[2]

Thus the only purpose of the evidence could have been for impeachment of one witness; in *Biggs*, the purpose was to exculpate the defendant by showing that at the time

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[2]At the commencement of the trial, the following colloquy took place between counsel for the defendant Gallegos, who made the original motions, and the court:

"• • •

"THE COURT: Let me interrupt you for a moment. I am making the statement not as fact, but to elicit information if it is inaccurate. This whole matter turns really over a witness—Carlos Martin Ortega—

"Mr. Simrin: Correct.

"THE COURT: Well, if that witness were not called, then there is really no serious reason for you to urge your motion.

"Mr. Simrin: That is correct. And if the witness is not called, on behalf of Defendant Gallegos, I would withdraw my motion.

"THE COURT: That's what I gather from your documents. I want to be sure I am correct.

" • • •"

of the alleged offense, the defendant was acting as an informant and was an active undercover operator for the Bureau of Narcotics Enforcement.

It is obvious that under any interpretation of the facts, the required records in this case did not bear on the issue of guilt or innocence, but only on the impeachment of a single witness. Therefore, even under the rule enunciated in *Biggs*, there is no error requiring a reversal here.

Furthermore, the evidence in the instant case is overwhelming, with several eye witnesses as well as physical evidence pointing to the guilt of the defendants. Any error was therefore harmless (*Chapman v. California*, 386 U.S. 18; *People v. Stout*, 66 Cal.2d 184).

III. *The Aranda Rule.*

Appellants Mata and Vargas claim error in permitting into evidence the testimony of one Carlos Ortega concerning a conversation with their codefendant Gallegos. In this testimony Gallegos referred to "we", "they", and "them", presumably meaning Mata and Vargas as well as himself, in connection with various aspects of the stabbing. Later Gallegos wrote a note to Ortega saying that they did their job and took pride in themselves; here Gallegos allegedly mentioned Mata and Vargas by name.

No admonition restricting this testimony to the defendant Gallegos was given by the trial judge and no cautionary instruction was given the jury that the testimony could be used against that defendant only.

People v. Aranda, 63 Cal.2d 518, 530, established the rule that when the prosecution proposes to introduce into evi-

dence an extrajudicial statement of one defendant that implicates a codefendant, the trial court may either (1) permit a joint trial if deletions are made as to all implications of the codefendant; or (2) grant a severance of trials; or (3) exclude the testimony. However, it has subsequently been made clear by the cases that the failure to object and assert one's *Aranda* rights at trial constitutes a waiver of those rights. *People v. McGautha*, 70 Cal.2d 770, 785; *People v. Terry*, 38 Cal.App.3d 432, 443.

In the present case, the only objections to Mr. Ortega's testimony were upon grounds other than *Aranda* violations. Thus, appellants have waived any *Aranda* rights they may have possessed.

Furthermore, it appears that any adverse implications of these extrajudicial statements were ambiguous at best. Thus, even if appellants had preserved their rights on appeal by virtue of a timely objection, it is questionable whether the provisions of *Aranda* would be applicable. And even if *Aranda* did apply, the evidence so overwhelmingly pointed to appellants' guilt, that any error would be harmless. *Harrington v. California*, 395 U.S. 250, 252-254 (1969); *Chapman v. California*, 386 U.S. 18, 24 (1967); *People v. Epps*, 34 Cal.App.3d 146.

We accordingly find no reversible error here.

IV. *Failure to Instruct on Statements of Coconspirator.*

The statements made by appellant Gallegos (hereinbefore referred to) were admitted on representations of the prosecuting attorney that a conspiracy existed.

Appellants Vargas and Mata contend that in admitting into evidence these statements as an exception to the hearsay rule, the court should have instructed the jury on the law pertaining to the testimony of a coconspirator, *sua sponte*. No such instructions were requested by appellants at the trial.

Appellants contend that the giving of the appropriate conspiracy instructions would have required the jury to determine whether there was in fact a conspiracy and that appellant was a member of it before the jury could consider the incriminating statements by codefendants to implicate appellant; they further contend that existence of a conspiracy is a preliminary fact that must be found by the trial court before statements made during such conspiracy are admissible. (Evidence Code section 403; *People v. Goldberg,* 152 Cal.App.2d 562.)

But appellants have made no showing that a *sua sponte* instruction is required. Even in the analogous situation involving the duty to instruct as to the utilization of accomplice testimony, not all failures to so instruct constitute reversible error (*People v. Gordon,* 10 Cal.3d 460, 470-473). In such case a miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appellants would have been reached in the absence of error. (*People v. Gordon, supra,* at 470.)

In this case, other evidence sufficiently pointed to the guilt of all three appellants. Eyewitness testimony placed all of the appellants at the scene of the murder and partici-

pating in it. Physical evidence, including gloves, a knife, and a jacket with blood on it were found. Statements of various defendants were included in the testimony. After an examination of the entire cause, including the evidence, the court is of the opinon that it is not reasonably probable that a result more favorable to appellants would have been reached had the court given the conspiracy instruction.

Thus any failure on the part of the trial court to instruct *sua sponte* did not substantially prejudice appellants and was not reversible error.

V. *Claims of Error in Admission of Evidence.*

Various alleged errors in the admission of evidence are cited as grounds for reversal. Appellant Gallegos claims error in the receipt of evidence relating to the Mexican Mafia and Nuestra Familia was prejudicial. He concedes that evidence relating to the existence of these two prison groups was proper; he contends, however, that the trial court committed reversible error in permitting testimony as to activities of these organizations relating to acts of violence occurring at other institutions in which appellant was not involved.

The activities of the rival inmate factions were the basis of showing motive in the prosecution's case. In connection with these activities, it was within the sound discretion of the trial court to admit evidence of the nature of the group and the nature of their activities in general in institutions; absent this latter evidence, testimony as to their existence would be meaningless. The admission of such evidence being within the sound discretion of the trial court, it will not be

disturbed on appeal absent a showing of abuse of such discretion. (*People v. Archerd,* 3 Cal.3d 615.)

Appellant Mata contends that the trial court erred in admitting the hearsay evidence of one Albert Mills, who testified as to statements another witness, inmate Childress, made prior to trial concerning the fact that he had witnessed a killing and feared for his life. Immediately thereafter Childress identified the defendants as the perpetrators from photographs. Evidence of such a statement was admitted to corroborate identification at the trial, and also as independent evidence of identification. This was proper pursuant to Evidence Code section 1238.[3] (*People v. Gould,* 54 Cal.2d 621, 626; *People v. Imbler,* 57 Cal.2d 711, 716.)

VI. *Misconduct of Prosecutor.*

Appellant Mata contends that the prosecuting attorney was guilty of prejudicial misconduct in asking the witness Schoo on cross-examination, "Isn't it a fact that you used to carry his shank for him?" Schoo was an alibi witness for the defendant Mata. No objection to the question was made at the time it was asked.

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[3]Evidence Code section 1238 provides:

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

"(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

"(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

"(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

It would appear that the question was appropriate in order to show bias on the part of the witness. No claim of dishonesty or deception on the part of the prosecutor is made (See *People v. Beivelman,* 70 Cal.2d 60, 75-77). We find no basis for the claim of misconduct.

The judgment is affirmed.

/s/ GINSBURG, J.*

We concur:

/s/ BROWN (GEO. A.), P.J.

/s/ GARGANO, J.

*Assigned by Chairman of Judicial Council.

Appendix D

In the United States District Court
For the Northern District of California

No. C-77-2801 SAW

Robert Mata,
Petitioner,
vs.
George Sumner,
Respondent(s).

[Filed May 23, 1978]

JUDGMENT

In accordance with the accompanying order,

IT IS HEREBY ADJUDGED that the petition for habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL
Judge

In the United States District Court
For the Northern District of California

No. C-77-2801 SAW

Robert Mata,
Petitioner,
vs.
George Sumner,
Respondent.

[Filed May 23, 1978]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Robert Mata, imprisoned in San Quentin State Prison, Tamal, California, has petitioned for habeas corpus. An Order to Show Cause was filed on January 19, 1978, and a Return to said Order was filed on February 28, 1978. Petitioner filed a Traverse on April 4, 1978. Both parties have filed additional memoranda.

Respondent's first contention is that petitioner's claim cannot be addressed on the merits because he failed to raise some of them in the state courts. *Wainwright v. Sykes,* 433 U.S. 72 (1977). While it is true that petitioner did not raise all his claims on direct appeal to the state courts, he did raise his other claims in a petition for state habeas corpus. While that petition was denied without opinion, for purposes of habeas corpus review it is assumed that the state court addressed the merits of the petition. *Thompson v. Procunier,* 539 F.2d 26, 28 (9th Cir. 1976). Thus petitioner

has raised all the issues now raised in this proceeding to the California courts. *Wainwright* is therefore inapplicable.

On the merits, the Court concludes that the petition must be denied. While petitioner has established that irregularities occurred in the pre-trial photographic identification of petitioner by witnesses Almengor and Allen, these irregularities did not so taint the in-court identifications of petitioner by these witnesses as to establish a constitutional violation under *Simmons v. United States,* 390 U.S. 377, 384 (1968). *See United States v. Baxter,* 492 F.2d 150, 172 (9th Cir. 1973), *cert. denied,* 414 U.S. 801 (1973), 416 U.S. 940 (1974). Moreover, even if the testimony of Allen was tainted, the positive identification of petitioner by witness Childress and the strong one by Almengor makes the error harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

Petitioner's argument that he did not receive effective assistance of counsel is predicated solely upon what he conceives to be the egregious constitutional violation involved in the photo-identification procedure. Inasmuch as petitioner's *Simmons* claim is at best arguable, his counsel was not incompetent in failing to seek suppression of petitioner's in-court identification, whichever standard of competency is employed. *De Kaplany v. Enomoto,* 540 F.2d 975 (9th Cir. 1976) (en banc), *cert. denied,* 429 U.S. 1075 (1977). It is therefore unnecessary to consider which standard the Ninth Circuit will ultimately choose for determining the competency of counsel. *Cooper v. Fitzharris,* 551 F.2d 1162 (9th Cir. 1977), *petition for rehearing en banc granted.*

Petitioner's final argument, that the California Court of Appeal lacked an adequate record before it to enable it to review petitioner's appeal, also lacks merit. Petitioner was entitled to a record of sufficient completeness to enable the appellate court to find error, if there was error, in the proceeding below. *Draper v. Washington,* 372 U.S. 487, 497-98 (1963). That is precisely what petitioner received.

IT IS THEREFORE HEREBY ORDERED that the petition for a writ of habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL

Judge